

Comparing the Effects of Judges' Gender and Arbitrators' Gender in Sex Discrimination Cases and Why It Matters

PAT K. CHEW*

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* Judge J. Quint Salmon & Anne Salmon Chaired Professor of Law, University of Pittsburgh School of Law. I am grateful to Nancy Welsh, Andrea Kupfer Schneider, Marina Angel, Lauren Kelley-Chew, and Robert Kelley for their very helpful suggestions on drafts of this article; to Scott Beach and Janet Schlarb of the University of Pittsburgh Center for Social and Urban Research and Caiyan Zhang at the College Board for their statistical consultation; to the Women's Law Center (University of Texas) and to the Update for Feminist Law Professors 2014 (held at the University of Pennsylvania School of Law) for the opportunity to present my research. Finally, I thank my Employment Law Arbitration Seminar students, who piloted empirical studies of employment law arbitrations, and to the Law School Document Technology Center for their never-ending good cheer and professionalism.

I. INTRODUCTION

Empirical research substantiates that the judges' gender makes a difference in sex discrimination and sexual harassment cases. Namely, female judges are more likely than male judges to render a decision in the employee plaintiffs' favor, presumably because male and female judges have different perspectives on what constitutes sex discrimination and sexual harassment. The author's empirical study of arbitration of sex discrimination cases administered by the American Arbitration Association between 2010 and 2014, however, finds that this judges' "gender effect" does not occur. Namely, there is no significant difference in the decision-making patterns of female and male arbitrators as indicated by case outcomes.

This contrast between a judge's gender effect and the absence of an arbitrator's gender effect is particularly worth exploring, given the wide (and often mandatory) use of arbitration to resolve sex discrimination cases and the resulting decrease in the use of the courts. Notably, the broad utilization of arbitrations in employment disputes occurs even though employees may strongly prefer the judicial process.

This article begins in Part I with a summary of the research on the effect of judges' gender in sex discrimination and sexual harassment case outcomes. This "gender effect" among judges in litigation is explained, and the value of alternative viewpoints in decisionmaking is noted. Part II briefly explores the increasing and extensive use of mandatory arbitration for resolving sex discrimination and sexual harassment workplace disputes. It also observes fundamental differences between litigation and arbitration, raising questions about the procedural and substantive adequacy of arbitration. Part III describes the author's exploratory empirical study of the effect of arbitrators' gender on case outcomes, revealing the absence of the arbitrators' "gender effect." Part IV further discusses the explanations and implications of this finding, particularly given the judges' gender effect found in litigation. It proposes that characteristics of arbitrators, the arbitration process, and arbitration cases all combine to help explain the gender effect differences. Finally, the article suggests that this specific inquiry about gender effect differences actually reveals concerns about the arbitration process more broadly: do the employers' advantages as repeat players, the arbitrators' competitive pressures, and the arbitrators' unmonitored discretion in decision-making all combine to both explain the gender effect differences and problematic biases in the arbitration process?

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II. JUDGES' GENDER MATTERS IN SEX DISCRIMINATION CASES

In recent years, researchers have conducted substantial and provocative work on the effect of a judge's gender on sex discrimination and sexual harassment case outcomes.¹ While the effect of the judges' gender is less clear in other types of cases,² there is a consensus on the effect in these cases. The judges' gender matters: plaintiffs, who are typically female, are more likely to be successful before female judges than male judges.

While an array of studies have drawn this conclusion, the following widely cited studies exemplify the research methods and the findings. The first is a landmark study by Jennifer Peresie;³ the second is a methodologically innovative study by Christine Boyd and her colleagues.⁴

Jennifer Peresie studied all sexual harassment and sex discrimination cases decided by the Federal Courts of Appeals between 1999 and 2001.⁵ The data set identifies 556 total cases (all involving appellate review on the merits of the claims), consisting of 1,666 decisions rendered by individual judges. Her findings are striking. First, it is difficult for plaintiffs (most typically female employees) to succeed in their sexual harassment and sex discrimination cases against the defendants (typically the employing company). In 73% of these cases, the plaintiffs lose.⁶ In other words, plaintiffs have no better than a one in four chance of success.⁷

Moreover, Peresie finds that judge's gender makes a difference in his or her outcome voting behavior.⁸ While both male and female judges generally rule against plaintiffs, male judges are significantly more likely to do so. They hold for the plaintiffs only 24% of the time.⁹ In contrast, female judges are

¹ While this empirical work does not predict what any one particular judge will decide in any one particular case, it can indicate meaningful patterns in judicial decision-making. See, e.g., Christina Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389 (2010); Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making*, 20 J.L. ECON. & ORG. 299 (2004); SALLY J. KENNEY, GENDER AND JUSTICE: WHY WOMEN IN THE JUDICIARY REALLY MATTER 28–40 (2013); and Pat K. Chew, *Judges' Gender and Employment Discrimination Cases: Emerging Evidence-Based Empirical Conclusions*, 14 IOWA J. GENDER, RACE, JUST. 359 (2011).

² See, e.g., Boyd et al., *supra* note 1, at 389.

³ See generally Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759 (2005).

⁴ Boyd et al., *supra* note 1, at 389.

⁵ Peresie, *supra* note 3, at 1767.

⁶ *Id.* at 1768.

⁷ *Id.* at 1767–69.

⁸ *Id.* at 1776–77.

⁹ *Id.* at 1769.

more likely to hold for the plaintiffs, reaching a decision in their favor 39% of the time.¹⁰ Thus, having a female judge increases the probability of a plaintiff's success by 86% in sexual harassment cases and 65% in sex discrimination cases.¹¹

In addition, Peresie finds that the presence of women on an appellate panel affects how male judges vote.¹² Namely, male judges are more likely to hold for the plaintiff when at least one female judge serves on the panel.¹³ Specifically, the presence of a female judge more than doubles the probability that a male judge rules for the plaintiff in sexual harassment cases and nearly triples the probability in sex discrimination cases.¹⁴ Peresie further finds this gender effect regardless of the political ideology of the female judge (as indicated by the political party of the appointing president).¹⁵ Likewise, having a female judge—whether liberal or conservative—increases the probability of plaintiffs' success on panels of judges with varying ideologies.¹⁶

A study by Christina Boyd and her associates analyzes the effect of judges' gender in the federal appellate courts in thirteen different subject areas, including sex discrimination cases.¹⁷ They used a research method that compares cases and judges with shared characteristics, rather than the more typical logistic regression method which considers all cases and judges. These researchers match cases (e.g. year of decision and direction of the lower court decision) and judges (e.g., ideology and age) that are as similar as possible and then analyze whether the judge's gender makes a difference.¹⁸

They find it made a significant difference in sex discrimination cases in both how individual judges vote (female judges are more likely than male judges to vote for the plaintiffs) and in the kind of panel effects described above. Specifically, in sex discrimination cases overall, their results indicate that the likelihood of a male judge holding for the plaintiff increases by 12% to 14% when a female sits on the panel.¹⁹ When taking into account political ideology, the effect is further amplified: for male judges at "relatively average

¹⁰ *Id.*

¹¹ *Id.* at 1776.

¹² *Id.* at 1776–79.

¹³ *Id.* at 1778.

¹⁴ *See id.* (the presence of a female judge increases the probability from 16% to 35% that a male judge rules for the plaintiff in sexual harassment cases and increases the probability from 11% to 30% in sex discrimination cases).

¹⁵ *Id.* at 1777.

¹⁶ *Id.* at 1787.

¹⁷ *See generally* Boyd et al., *supra* note 1.

¹⁸ *Id.* at 389, 395, 397.

¹⁹ *Id.* at 406.

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levels of political ideology,” the likelihood of a vote for the plaintiff increases by almost 85% when a female judge is on the panel.²⁰

As Boyd discusses more generally:

[W]e observe consistent and statistically significant individual and panel effects in sex discrimination disputes; not only do males and females bring distinct approaches to these cases, but the presence of a female on a panel actually *causes* male judges to vote in a way they otherwise would not – in favor of plaintiffs.²¹

A. *Explaining the Judges' Gender Effect*

To summarize: female judges have different decisionmaking patterns than their male colleagues, and the presence of a female judge on an appellate panel influences the decisionmaking of her male judicial colleagues in sex discrimination cases. This consistent phenomenon is what this author calls the “judges’ gender effect.” How might we explain the judges’ gender effect in Peresie’s, Boyd’s, and others’ studies?

Extensive existing empirical social psychology research provides us with several possible explanations. First, many investigators have demonstrated that women have distinct experiences and socialization.²² These experiences and socialization yield unique and valuable information that becomes especially salient when evaluating situations involving complex gender dynamics, such as sexual harassment in the workplace. In this way, both male and female judges bring distinct insights to their own decision-making, including their assessment of sex discrimination and sexual harassment claims.²³

Furthermore, substantial research indicates that women have different views than men on what constitutes sex discrimination and sexual harassment.²⁴ In a meta-analysis of the relevant research, for instance,

²⁰ *Id.*

²¹ *Id.*

²² See, e.g., Cecilia L. Ridgeway & Lynn Smith-Lovin, *The Gender System and Interaction*, 25 ANN. REV. SOC. 191 (1999). See also KENNEY, *supra* note 1, at 1–18 (applies this research to female judges).

²³ As consistent with the informational account for the judges’ gender effect. Boyd, et al., *supra* note 1, at 391–92. See also Peresie, *supra* note 3, at 1780 n.88.

²⁴ See generally Maria Rotundo et al., *A Meta-Analytic Review of Gender Differences in Perceptions of Sexual Harassment*, 86 J. APPLIED PSYCHOL. 914 (2001); Kimberly A. Lonsway et al., *Sexual Harassment Mythology: Definition, Conceptualization, and Measurement*, 58 SEX ROLES 599 (2008).

Rotunda and her associates found ample evidence of gender differences, with women considering a broader range of behavior as sexual harassment.²⁵ While these differences are not always great, they are meaningful. Further, she noted that the magnitude of the gender differences varies by the type of conduct at issue.²⁶ Referring to seven categories of conduct, as shown below, she found the magnitude of the female-male differences were larger for conduct involving derogatory attitudes such as sex-stereotyped jokes, both those directed at women in general (impersonal) and those directed at specific individuals (personal). She also found that men and women were more likely to differ on whether pressure for dates constituted sexual harassment. Larger gender differences for physical sexual conduct such as fondling or kissing also exist. To illustrate, in one study, 89% of women considered sexual touching as sexual harassment, as compared to 59% of men.²⁷ Men may view this kind of contact as a compliment, while women may view it as threatening. In contrast, smaller female-male differences exist in conduct involving sexual propositions and sexual coercion. Both genders are likely to perceive these behavior as sexual harassment. Similarly, smaller gender differences exist with physical nonsexual conduct such as a congratulatory hug. Both genders are likely to conclude that this kind of conduct is not sexual harassment.²⁸

Table 1
Description of Seven Behavioral Categories of Sexual Harassment

Category	Description	Behavioral examples
Derogatory attitudes—impersonal	Behaviors that reflect derogatory attitudes about men or women in general	Obscene gestures not directed at target. Sex-stereotyped jokes.
Derogatory attitudes—personal	Behaviors that are directed at the target that reflect derogatory attitudes about the target’s gender	Obscene phone calls. Belittling the target’s competence.
Unwanted dating pressure	Persistent requests for dates after the target has refused	Repeated requests to go out after work or school.

²⁵ Rotundo et al., *supra* note 24, at 919.
²⁶ *Id.* at 918.
²⁷ *Id.* at 920.
²⁸ *Id.* at 919–20, tbl. 1.

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Category	Description	Behavioral examples
Sexual propositions	Explicit requests for sexual encounters	Proposition for an affair.
Physical sexual contact	Behaviors in which the harasser makes physical sexual contact with the target	Embracing the target. Kissing the target.
Physical nonsexual contact	Behaviors in which the harasser makes physical nonsexual contact with the target	Congratulatory hug.
Sexual coercion	Requests for sexual encounters or forced encounters that are made a condition of employment or promotion	Threatening punishment unless sexual favors are given. Sexual bribery.

When applied specifically to sex discrimination and sexual harassment cases, these insights are especially relevant.²⁹ In sexual harassment cases, for instance, key inquiries are whether the harassment was attributable to the employee's sex (rather than some other reason) and whether the harassment was sufficiently "severe or pervasive" to create a hostile work environment.³⁰ In sex discrimination cases, a key inquiry is whether an employment decision was motivated by gender.³¹

This body of research has additional applications to appellate panels, where jurists engage in deliberative and collegial processes and can "be swayed by an articulate and well-reasoned arguments from a colleague with a different opinion."³² Indeed, researchers explained that when a women is on

²⁹ While the Equal Employment Opportunity Commission (EEOC), 29 C.F.R. § 1604.11 (2016), defines sexual harassment as verbal or physical conduct of a sexual nature that unreasonably interferes with an individual's job performance or creates a hostile work environment, questions on its interpretation remain. Which facts justify a conclusion of sexual harassment? Courts look to the perceptions of a reasonable person in similar circumstances. *Rabidue v. Osceola Ref. Co.*, 584 F. Supp. 419 (W.D. Mich. 1984). The research on gender differences is relevant to the perception of this "reasonable person."

³⁰ See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Oncale v. Sundowner Offshore Sevs., Inc.*, 523 U.S. 75 (1998).

³¹ See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (describing the basic legal inquiries in a federal employment discrimination claim).

³² Peresie, *supra* note 3, at 1782 n.92.

an appellate panel, her male colleagues perceive her knowledge about sex discrimination “as more credible and persuasive” than their own knowledge—thereby affecting the male judges’ decisions.³³ Peresie likewise suggests that male judges may defer to female judges on sex discrimination cases, taking their “cue” from female judges who they view as having particular insights. She further finds evidence that male judges “learned” in sexual harassment cases. She found that the greater number of the cases in which a male judge had previously sat with a female judge, the more likely he is to rule for the plaintiff in a given case.³⁴ In these ways, a kind of repeat player learning curve apparently occurs.

B. *Value of Judges’ Gender Effect*

Social science research consistently demonstrates that incorporation of diverse viewpoints is an important complement to sound decisionmaking.³⁵ Likewise, evidence indicates that when groups are comprised of more diverse members, those members learn from each other and provide checks on the correctness of shared information, ultimately leading to more accurate decisionmaking.³⁶ When we apply these findings to the law, we would expect incorporation of diverse perspectives and viewpoints to improve the accuracy of legal decisionmaking. For instance, in sexual harassment cases, research suggests men may be less likely to consider sex-role stereotyping of women or sexually suggestive microaggressions as cognizable sexual harassment.³⁷ In contrast, female judges may notice subtleties about what constitutes bias that male judges do not see.³⁸ In this way, the gendered perspective of a female

³³ Boyd et al., *supra* note 1, at 392.

³⁴ Peresie, *supra* note 3, at 1784 n.103. Women may similarly defer to male colleagues regarding experiences on which they have particular insight. *Id.*

³⁵ Gender diversity also appears to contribute in other ways. See, e.g., Christina L. Boyd, *She’ll Settle It*, 1 J.L. & CTS. 193 (2013) (research on gender differences in management skills, finding that in civil rights cases and tort cases, female judges are more likely than male judges to successfully foster settlement of their cases).

³⁶ See, e.g., Sheen S. Levine & David Stark, *Diversity Makes you Brighter*, N.Y. TIMES, Dec. 9, 2015, <http://www.nytimes.com/2015/12/09/opinion/diversity-makes-you-brighter.html?ref=topics&r=0> (research indicating that ethnically diverse groups self-correct and thus make more correct economic decisions); Sheen S. Levine et al., *Ethnic Diversity Deflates Price Bubbles*, 111 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES 18524 (2014) (describes research study described in NY Times article).

³⁷ See *supra* notes 23–26 and accompanying text.

³⁸ See THERESA M. BEINER, *GENDER MYTHS V. WORKING REALITIES: USING SOCIAL SCIENCE TO REFORMULATE SEXUAL HARASSMENT LAW* (New York University Press, 2005).

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judge may result in a more nuanced, textured, or comprehensive analysis of the facts and the law.

Does gendered perspective make a female judge's decision inherently more valid or "fair" than a male judge's? Alternatively, does it make it less valid or "fair"? In a democratic society where half the population and almost all the aggrieved employees in sex discrimination cases are women, the representation of views from both genders is important. Our notions of fairness and the legitimacy of the process require such representation.³⁹ Denying gendered views—whether male or female—is a sign of stigma and exclusion which sends the signal that those perspectives are not worthy and should not be part of the discourse.⁴⁰ We have seen that gendered perspectives inform the outcomes of sexual harassment and discrimination cases when decided by judges. As more women join the judiciary, we expect that case outcomes will reflect further "gendered perspective" equilibrium.⁴¹

III. ARBITRATION IN CONTRAST TO LITIGATION

Over the last three decades, a dramatic transition in civil justice has been underfoot, particularly since the Supreme Court case of *Gilmer v. Interstate/Johnson Lane Corp.*⁴² More disputes that were once resolved in courts are now resolved in private dispute resolution processes, such as arbitration.⁴³ Of particular relevance here, many employment disputes, including sex discrimination complaints, go to arbitration.⁴⁴ Pursuant to employer-mandated grievance procedures in many corporate settings, thousands of employees are required to resolve their disputes with their

³⁹ KENNEY, *supra* note 1, at 127 (explaining how "justice must not only be done, it must be seen to be done"); Nancy A. Welsh, *What Is "(Im)Partial Enough" in a World of Embedded Neutrals?*, 52 ARIZ. L. REV. 395, 424 (2010) (explaining that perceptions of fairness are based in part on the opportunity for people to tell their stories).

⁴⁰ KENNEY, *supra* note 1, at 176–79.

⁴¹ See, e.g., Paul M. Collins, Jr., Kenneth L. Manning & Robert A. Carp, *Gender, Critical Mass, and Judicial Decision Making*, 32 LAW & POL'Y 260 (2010) (indicating that women judges exhibit distinctive behavior in criminal justice and civil rights cases when there is a critical mass of women).

⁴² *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

⁴³ Alexander J. S. Colvin, *Employment Arbitration: Empirical Findings and Research Needs*, 64 DISP. RESOL. J. 6 (2009); e.g., Welsh, *supra* note 39, at 417; accord, R. Scott Oswald & Adam A. Carter, *Forced Arbitration Clauses as Condition of Employment*, 83 BNA INSIGHTS 956 (2014); but see Thomas J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations*, 19 HARV. NEG. L. REV. 1, 12 (2014) (noting increased use of mediation).

⁴⁴ See Colvin, *supra* note 43.

employers in arbitration. One survey indicated almost half of all businesses had employer promulgated arbitration programs.⁴⁵ This occurs even though the employees' complaints have a statutory basis and employees would prefer to take their complaints to the courts.⁴⁶

Litigation and arbitration, however, differ in critical ways including their fundamental nature, the selection of the decisionmakers, and the procedures for the decisionmaking process. While arbitration presumably has efficiency and convenience advantages, does it offer a comparably fair and just process for resolving disputes?⁴⁷ The court system has carefully designed the litigation process with many required procedural rules intended to ensure adequate due process to all those involved.⁴⁸ Arbitration, in contrast, is essentially a privately designed dispute resolution process captured in a legally enforceable contract. Like other contracts, the courts do not review the terms and equity of the agreement to arbitrate unless one of the parties argues that the agreement violates fundamental contract principles.⁴⁹

In litigation, judges or juries are the decisionmakers, resolving the legal disputes before them. Federal court judges, for instance, are selected through a formal and systematic process where judicial candidates are rigorously vetted.⁵⁰ In addition, practicing judges are public figures and are subject to an array of professional rules of conduct.⁵¹ In contrast to litigation, arbitrators in arbitrations are the decisionmakers. There is no mandated or systematic

⁴⁵ *Id.* at 6. 757 nonunion businesses indicated 46.8% had employer promulgated arbitration programs. *Id.*

⁴⁶ *Gilmer*, 500 U.S. at 20.

⁴⁷ Welsh, *supra* note 39, at 424–25 (further describing procedural justice issues); e.g., Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1369 (warning that informality of alternative dispute processes without the due process safeguards of the court system might leave certain parties with less power more vulnerable); accord, Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System'*, N.Y. TIMES, Nov. 1, 2015, http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html?_r=0.

⁴⁸ See, e.g., FED. R. CIV. PRO. (2016); JUDITH RESNIK, *PROCESSES OF THE LAW: UNDERSTANDING COURTS AND THEIR ALTERNATIVES* (Foundation Press 2004).

⁴⁹ E.g., *Hooters of America v. Phillips*, 173 F.3d 933 (4th Cir. 1999); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997); *Broemmer v. Abortion Services of Phoenix*, 840 P.2d 1013 (Ariz. 1992).

⁵⁰ *How Judges and Justices are Chosen*, US HISTORY, <http://www.ushistory.org/gov/9d.asp> (last visited Nov. 2, 2016) (describing process of nomination and selection of federal judges).

⁵¹ *History of the Federal Judiciary*, FEDERAL JUDICIAL CENTER, <http://www.fjc.gov/history/home.nsf/page/judges.html> (last visited Nov. 2, 2016) (providing biographical information on all federal court judges).

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method of selecting arbitrators.⁵² Arbitrators are technically selected and agreed upon by both parties in most cases; however, as with all contracts, one party may have more bargaining power and expertise.

Indeed, in employment arbitrations, employers typically have several process advantages. First, employers typically have more resources; are more experienced in vetting and using arbitration service providers, such as the American Arbitration Association; are more familiar with prospective arbitrators, and can access informal word-of-mouth referrals.⁵³ Nancy Welsh, for instance, noted the control that institutional repeat players have “over the selection of the organization that will provide the dispute resolution services, the procedures that will be used, and the criteria that will be used to determine the pool of neutrals who will decide cases....”⁵⁴

Meanwhile, employee plaintiffs have more limited resources and are presumably participating in an employment arbitration this one time.⁵⁵ As a result, plaintiffs are less familiar with how the system works and who the prospective arbitrators are. Consistent with the private nature of arbitrations, the selection of arbitrators is a private, rather than a public, process. While there are initiatives to provide more publicly available information about arbitrators,⁵⁶ currently no comprehensive public directory of arbitrators exists and no readily accessible record of arbitrations over which they have presided exists.

Finally, in the litigation system, the proceedings are governed by a system of legal principles and a tradition of publicly available precedents. Judicial rulings are reviewable through an appellate process. In contrast, the parties in the arbitration can instruct arbitrators to use whatever criteria they choose for resolving the dispute, such as industry customs or notions of equity.⁵⁷ The arbitrators are not automatically bound to follow legal principles or legal

⁵² But see JACQUELINE M. NOLAN-HALEY, *ALTERNATIVE DISPUTE RESOLUTION* 463 (4th ed. 2013), and other examples of proposals for aspirational due process procedures protocols for arbitration.

⁵³ Gina Viola Brown & Andrea Kupfer Schneider, *Gender Differences in Dispute Resolution Practice: Report on the ABA Section of Dispute Resolution Practice Snapshot Survey* (MARQ. UNIV. L. SCH. LEGAL STUDIES RES. PAPER No. 14-04, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2390278.

⁵⁴ Welsh, *supra* note 39, at 418.

⁵⁵ Plaintiffs who use lawyers who are experienced in arbitrating employment disputes may also benefit from whatever knowledge and contacts that lawyer has as a repeat player.

⁵⁶ See e.g., CATHERINE A. ROGERS, *ETHICS IN INTERNATIONAL ARBITRATION* (2014) (advocating that international arbitrators self-regulate, including more public dissemination of publicly available information about prospective arbitrators).

⁵⁷ NOLAN-HALEY, *supra* note 52, at 216–17 (noting research showing that most arbitrators thought they could ignore substantive law if justice required).

precedents. Even when arbitrators ostensibly defer to legal principles and precedents, there is no process for reviewing whether their application of legal precedents is correct. Arbitrations are typically final and binding awards and not subject to any further judicial review on the merits.⁵⁸ In these ways, arbitrators have more discretion than judges during the arbitral decisionmaking process and fewer checks for any abuses of discretion.

IV. ARBITRATORS' GENDER IN SEX DISCRIMINATION CASES

Given the compelling work on judges' gender and the increasing use and concerns about the arbitration process, this article tackles the following questions: Does the arbitrators' gender make a difference in sex discrimination and sexual harassment case outcomes, as it does for judges in litigation? If so, does it matter? If having a female arbitrator increases the likelihood of plaintiff success, this result would mirror the presence and potential benefits of gendered perspectives in judicial litigation. On the other hand, if the arbitrator's gender does not affect outcomes, what explains the discrepancy in decisionmaking between female judges and female arbitrators? How might this disadvantage the increasing number of employee complainants who are forced to use arbitration?

While comprehensive information about arbitration between private parties continues to be elusive, increased access to a wealth of information about arbitral opinions from sources such as the American Arbitration Association (AAA) has become available in recent years. Alexander Colvin, for instance, extensively studies the AAA files and offers general descriptive information about the arbitration process.⁵⁹ In one study, Colvin reviewed all employer-promulgated cases reported by the AAA over a four-year period.⁶⁰ Among other variables, Colvin determined the overall employee success rate, number of claims, claimant's salaries, time for disposition, award amounts, and arbitration fees.⁶¹ In comparison with litigation, Colvin observed that 1) employees' win rates are decreased in arbitration, 2) award amounts are

⁵⁸ There are very limited bases for a judicial review of an arbitration award, as delineated in the Federal Arbitration Act, 9 U.S.C. § 10 (1925). See also Michael H. LeRoby, *Crowning the New King: The Statutory Arbitrator and the Demise of Judicial Review*, 29 J. DISP. RESOL. 1, 34–40 (2009).

⁵⁹ Alexander Colvin & Kelly Pike, *The Impact of Case and Arbitrator Characteristics on Employment Arbitration Outcomes* (June 2012); e.g., Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 3 (2011); accord, Colvin, *Employment Arbitration*, *supra* note 43.

⁶⁰ Colvin, *An Empirical Study of Employment Arbitration*, *supra* note 59, at 1.

⁶¹ *Id.*

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less, and 3) there is a shorter time to dispose of the dispute.⁶² Thus, employee plaintiffs as a group are substantively worse off in arbitration than in litigation, although the disputes are resolved more quickly. There is also strong evidence of a repeat player effect, again to the disadvantage of employees: employee win rates and awards are significantly lower when the employer has been in multiple arbitrations.⁶³ In addition, there is strong evidence of repeat employer-arbitration pairing effect: employees have lower win rates and receive smaller damage awards when the same arbitrator is involved in more than one case with the same employer.⁶⁴

The original research conducted for this article is unique given its particular focus on sex discrimination and sexual harassment arbitration cases.⁶⁵ The study empirically investigates AAA arbitration sex discrimination and sexual harassment cases between 2010-2014, analyzing a number of variables including the effect of the arbitrators' gender on case outcomes.⁶⁶ Given the existing findings that female judges are more likely

⁶² *Id.* at 30.

⁶³ *Id.* at 30–31.

⁶⁴ *Id.*

⁶⁵ As described earlier, there are studies on the effect of judges' gender in relevant court cases. *See infra* Part III. There also are limited studies on gender effects in labor arbitrations, but those arbitrations are subject to specific precedents and rules consistent with federal labor law while the cases in this study are from the non-union private sector workplace. Sandra M. Crews, *Gender and Labor Arbitration Reasoning: A Different Voice or Occupational Socialization?* (May 2000) (unpublished Ph.D. dissertation, University of Missouri-St. Louis) (on file with ProQuest Dissertations & Theses A&I); *e.g.*, Anne L. Draznin, *Gender Factors in Labor Arbitrator Selection* (Nov. 2000) (unpublished Ph.D. dissertation, Graduate School of Saint Louis) (on file with ProQuest Dissertations & Theses A&I); *accord*, Brian Bemmels, *Gender Effects in Grievance Arbitration*, 29 IND. RELAT. 513 (1990). *See*, Stephen J. Choi, Jill E. Fisch & A.C. Pritchard, *The Influence of Arbitrator Background and Representation on Arbitration Outcomes*, 9 VA. L. & BUS. REV. 43 (2014); *see also*, David Lipsky, Ryan Lamare & Abhishek Gupta, *The Effect of Gender on Awards in Employment Arbitration Cases: The Experience in the Financial Securities Industry*, 52 INDUS. REL. 314 (2013).

The most similar research to this study is on AAA employment cases and employment discrimination cases generally rather than sex discrimination cases specifically. Colvin & Pike, *supra* note 59. In that study, Colvin found a plaintiff success rate of 20% in employer promulgated arbitration agreements before female arbitrators and a 27.5% success rate before male arbitrators. He further noted: "This is a surprising finding....One possibility that needs to be investigated further is whether there are systematic differences in the professional backgrounds of female arbitrators. For example, are female arbitrators more likely to come from backgrounds representing management?" *Id.* at 20.

⁶⁶ The arbitration cases were identified through AAA Arbitration Awards, LEXISNEXIS GROUP (last visited May 1, 2014) for the May 2010 to May 2014 period. The percentage and number of cases in each year are as follows: 13.1% in 2010 (n=16),

than male judges to rule in favor of plaintiffs, the author predicted that female arbitrators would follow a similar pattern. Instead, evidence supports the opposite: there is no significant difference in case outcomes decided by female versus male arbitrators.

As shown below, of the 121 cases in the study, employee plaintiffs are successful in only 14%. “Success” was defined broadly to include any case outcome where the plaintiff received some part of what they claimed. If only cases where the plaintiff was totally successful are considered, their success rate drops to 8.3% of the cases. This plaintiff success rate is less than the 25.2% success rate in all employment arbitration cases,⁶⁷ indicating that employees are even less likely to win sex discrimination and sexual harassment cases than other employment disputes. Moreover, the success rate for employees in arbitration is notably less than the 27% success rate for employees in litigation as indicated in the Peresie study.⁶⁸

	<u>M</u>	<u>F</u>	<u>Total</u>
	<u>%</u>	<u>%</u>	<u>%</u>
Judges in SD/SH cases	24.0%	39.0%	27%
Arbitrators in SD/SH cases	14.7%	13.0%	14%

Particularly relevant to this article, the data shows an arbitrator's gender has no effect on outcomes. A male arbitrator presides over 62% (n=75) of the cases, while a female arbitrator presides over 38% (n=46) of the cases. Male arbitrators hold in favor of plaintiffs 14.7% of the time; female arbitrators hold in favor of plaintiffs 13% of the time. The difference between these percentages is not statistically significant. For a comparative reference, the data from Peresie's study on judges' gender is also provided.⁶⁹ In the Peresie

28 in 2011, 28 in 2012, 40 in 2013, and 10 in 2014, with no significant difference in plaintiff win rates by years. While the number of female plaintiffs (73%) is greater than male plaintiffs 25.4%, (89 versus 31), males represented about a third of all plaintiffs. However, there is no significant difference in the success rates of female versus male plaintiffs. The type of cases are also studied: 50% (61 are based on sex discrimination claims only), 24.6% (30 on sexual harassment claims only), 19.7% (24 on both sex discrimination and sexual harassment claims), and 47.5% (58 that include a retaliation claim.) Again, there is no significant difference in success rates based on the type of claim.

⁶⁷ Colvin & Pike, *supra* note 59, at 26, tbl. 1 (in employer-promulgated arbitration agreements). The plaintiff success rate in employment discrimination cases was 18.8%, also higher than the success rate in the present study. *Id.* at 17.

⁶⁸ Peresie, *supra* note 3, at 1776–79.

⁶⁹ *Id.*

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study, the differences between the male judges' and the female judges' decisionmaking patterns are statistically significant.

Comparing the decisionmaking patterns of male judges with male arbitrators and female judges with female arbitrators is also worthwhile. Male arbitrators are less likely than male judges to hold for claimants (9% difference). Female arbitrators, however, are much less likely than female judges to hold for the claimants (26% difference). In fact, women arbitrators had the lowest claimant success rate of any group. Thus, the author finds no within-group variance (between female and male arbitrators), but did observe large between-group variance (between female arbitrators and female judges). This suggests further consideration of female arbitrators is needed.⁷⁰

V. EXPLANATIONS FOR GENDER EFFECT DIFFERENCES

Why does a gender effect exist among judges and not among arbitrators? In particular, what might explain the wide discrepancy between female judges' and female arbitrators' decisionmaking patterns? Why are female arbitrators more likely than female judges to hold against the plaintiff (and for the defendant employers)?

Some tentative explanations focus on the decisionmakers (the judges and arbitrators) or the dispute resolution processes (litigation and arbitration). Finally, this article notes but ultimately discounts the possibility that the different cases in litigation and arbitration help explain the lack of an arbitrators' gender effect.

⁷⁰ The analysis is based on all the sex discrimination and sexual harassment cases over a recent four-year period. While the number of cases analyzed is sufficient to determine statistical significance, there are still a relatively small number of arbitration cases particularly in the subset comparisons. In addition, this data set is from the AAA, the largest provider of arbitration services, and the AAA indicated that this was a comprehensive collection of employer-promulgated arbitrations. However, other organizations provide arbitration services in the United States, as well as ad hoc arbitrations separate from those conducted by arbitration organizations. Thus, an analysis of those cases might theoretically yield different research results. Finally, these cases are all employer-promulgated cases. It could be that a study of both employer-promulgated and ad hoc individually negotiated employee arbitrations may yield different results. At the same time, given the scope of the study (the universe of sex discrimination and sexual harassment cases during a relatively lengthy period of four years), this exploratory study provides a meaningful glimpse into the effect of the arbitrators' gender in these types of cases.

A. Decisionmakers (Judges and Arbitrators) are Distinguishable

Perhaps female judges and arbitrators are distinguishable in ways that help explain their contrasting decisionmaking patterns. Women who become judges and those who become arbitrators may have contrasting education, socialization, or political orientations. For instance, if female arbitrators as a group are more likely to have business backgrounds or are more politically conservative, they may more likely identify with the management perspective than the employee perspective. Research suggests a person's ideology on the feminist movement, for instance, affects the way one thinks about sexual harassment.⁷¹

In addition, the selection process for arbitrators shapes who is selected. Simply put, employers have more control than employees over who is selected as the arbitrator.⁷² As described earlier, employers are repeat players who are likely to be more familiar with the arbitration process, including the selection of the arbitrators. They have more knowledge of the pool of arbitrators and their reputations. There is some evidence they have input into the pool of arbitrators listed with arbitration service providers, such as the AAA.⁷³ As repeat players, they are the most predictable users of arbitration services, and hence arbitrators' prime target clients. Employers' counsels naturally choose arbitrators, male or female, whom they believe empathize or can at least identify with their position. In contrast, employees are not repeat players and hence do not have these same advantages.

At the same time, arbitrators are in the business of arbitrating, which means they need consumers of their professional services. Unlike federal judges who are largely immune from market pressures (given their lifetime tenure), arbitrators are subject to the inherent market pressure to obtain, satisfy, and maintain consumers. Having a favorable reputation among corporate counsel is particularly important since they are the prime target consumers with repeat business or referral possibilities.

⁷¹ See Kimberly A. Lonsway, Lilia M. Cortina & Vicki J. Magley, *Sexual Harassment Mythology: Definition, Conceptualization, and Measurement*, 58 SEX ROLES 599 (2008); Justine E. Tinkler, *Resisting the Enforcement of Sexual Harassment Law*, 37 L. & SOC. INQUIRY 1, 20 (2012).

⁷² See *supra* discussion accompanying notes 52–55 describing employer advantages.

⁷³ See Welsh, *supra* note 39, at 419 (Describing Public Citizen report on mandatory arbitration in credit card disputes, crediting 95% win rate for credit card companies to the “cozy relationships between arbitral firms and credit-card companies.” Welsh describes the “arbitral firms’ reliance upon referrals from particular credit-card companies for the majority of their cases, the large fees paid by some credit-card companies to these firms, and the large number of cases handled by a small number of individual arbitrators.”).

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This combination of employers having more control over who is the arbitrator and arbitrators wanting their business may result in female (and male) arbitrators who are more management-oriented than their judicial counterparts. Brown and Schneider's survey research also suggests that female arbitrators may experience distinctive competitive pressures.⁷⁴ Their findings indicate that it is more difficult for women to be selected as arbitrators. First, women are underrepresented among arbitrators. In their sample of over 1,250 cases, arbitrators are women 20% of the time and men 80% of the time.⁷⁵ In labor and employment law cases, the split is 32% female and 68% male arbitrators.⁷⁶ Second, the selection process for arbitrators is revealing. The two most common processes for arbitrator selection are 1) choice of the parties, clients, or attorneys of the client; and 2) appointment from the ADR provider strike list, by the ADR provider, or by the court.⁷⁷ The first process depends on professional and personal networks as well as professional reputation; the second relies on being part of the professional ADR establishment. Both processes yield a disproportionate percent of male arbitrators. Female arbitrators are selected only 20% of the time in the first process and 19% of the time in the second process.⁷⁸ These findings evidence the difficulty of women arbitrators penetrating either the informal or formal referral and selection systems.⁷⁹ Further, the few women who do make it into the pool are more likely to be pro-management because the more pro-plaintiff ones are either intentionally kept out or "de-selected" after it becomes clear to employer clients that they are not disposed toward management.

B. *Dispute Resolution Processes (Litigation and Arbitration) are Distinguishable*

As earlier described, the litigation process and the arbitration process are fundamentally different.⁸⁰ The arbitration processes' particular characteristics may also explain the absence of the arbitrators' gender effect. While the

⁷⁴ Brown & Schneider, *supra* note 53, at 1–2 (studying lawyer members of American Bar Association (ABA) Dispute Resolution Section consisting of 743 responses, with 90% involved as neutrals or advocates in 1,250 ADR cases. There were more men than women at every practice bracket, but more gender balance with less experienced neutrals.). See also *id.* at 6, chart 6.

⁷⁵ *Id.* at 9, chart 9.

⁷⁶ *Id.* at 11, chart 12.

⁷⁷ *Id.* at 20, chart 22.

⁷⁸ *Id.* at 20, chart 22.

⁷⁹ This is in contrast to selection of mediators, where there is more gender balance when mediators are selected by roster and there is a 53/47 gender split. *Id.* at 19, chart 20.

⁸⁰ See *supra* Part II.

judicial process has well-delineated and mandated procedural safeguards, arbitral procedures are only recommended and largely unmonitored. While the litigation system is a well-established system of legal rules and precedents subject to judicial reviews, arbitral decisions are based only on recommended and largely unmonitored and unreviewable guidelines.

In litigation, well-established jurisprudence for employment discrimination law with many judicial precedents in both sex discrimination and sexual harassment cases are followed. The outcome in any particular case is, of course, not totally predictable, but general legal principles are predictably followed because of the judicial oversight offered at the pre-trial, trial, and appellate stages—with much information on public record. The well-delineated procedural rules in court proceedings also help assure that the relevant evidence is available to the decisionmakers.

No such assurances exist in arbitration. The resulting arbitral latitude allows arbitrators to consider the parties' extra-legal interests and offer creative extra-legal solutions, which in theory can serve very positive purposes. But this arbitral latitude also creates the opportunities for the arbitrators' more personal judgment and discretion in their reasoning and decisionmaking.⁸¹ Although not required, arbitrators can refer to sexual harassment laws as a source for their decisionmaking, presumably to lend authority to their decisions. However, they are not bound by rigorous legal interpretations and may be more susceptible to normative pressures.

Tinkler finds, for instance, normative pressure exists for both men and women in business settings to find that sexual harassment laws have not been violated, which consequently means that employers and management will not be held liable.⁸² She finds that there is resistance to using sexual harassment laws, even though sexual harassment in the abstract is perceived as wrong and injurious.

Tinkler posits that this resistance is linked to men and women's status in the gender hierarchy; that is, that men are seen as more competent and status-worthy than women.⁸³ Men see the laws as threatening. Women see the laws as disempowering. They hesitate to categorize actions as sexual harassment because women who do so are associated with the gender stereotypes of being emotional, irrational, or overly sensitive.⁸⁴ Women also resent, look down on, and want to distance themselves from employees who complain of sexual harassment.⁸⁵ Tinkler continues that the perceived legal definitions of sexual

⁸¹ See *supra* discussion accompanying notes 45–47.

⁸² Tinkler, *supra* note 71, at 1–3.

⁸³ *Id.* at 2.

⁸⁴ *Id.* at 4.

⁸⁵ *Id.* at 19.

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harassment threatens existing social norms: a man's role is to be aggressive, in charge of the situation, paying, and taking the initiative in asking for dates. A woman's role is to be more reactive and passive in defining the social/sexual relationship.⁸⁶

Thus, these normative pressures may influence women arbitrators particularly if they are already inclined to identify with a management perspective. As arbitrators attempting to establish their reputations in a male-dominated profession, female arbitrators would understandably want to avoid being viewed by prospective clients as emotional, irrational, or overly sensitive. Given that the arbitral process allows them wide and unmonitored discretion in their decisionmaking, they may be less likely, particularly in cases that could go either way, to find employees have been sexually harassed and consequently that employers are liable.

Finally, there is inferential evidence that female arbitrators may be less confident than their male counterparts and that this tendency may affect their decisionmaking. In one study, female negotiators were found to be less confident and male negotiators were over-confident.⁸⁷ Preliminary research also cites examples of women arbitrators as more likely than male arbitrators to cite external authority (such as judicial opinions), even when they do not have to.⁸⁸ One explanation for this behavior is that women arbitrators feel more of a need to justify their conclusions. Perhaps female arbitrators are excessively careful or just more prudently careful. Either way, this evidence suggests women arbitrators may have a higher propensity, for instance in a close case, to go with management given the normative and business pressures to do so.

⁸⁶ *Id.* at 5.

⁸⁷ See Sandra R. Farber & Monica Rickenberg, *Under-Confident Women and Over-Confident Men: Gender and Sense of Competence in a Simulated Negotiation*, 11 YALE J.L. & FEMINISM 1358 (1999).

⁸⁸ Laura Schneider, "Differences in Perspective: The Impact of Gender in Arbitration versus Litigation on Sex and Race Discrimination Claims," University of Pittsburgh Employment Law Arbitration Seminar paper at 13 (2014) (Empirical study finding that female arbitrators tended to use more external authority than male arbitrators. 89% of all female arbitrators in sexual discrimination opinions "cited to at least one case of statute instead of relying solely on the facts of the case to support a decision," as compared to male arbitrators 57% of the time. Female arbitrators also used these external authorities more extensively. Females cited cases and statutes multiple times even in short opinions, whereas males would often only refer to a single case.).

C. Cases in Litigation and Arbitration are Distinguishable

Separate from the pro-management arbitrators and the arbitration process itself, are the cases in litigation and those in arbitration distinguishable in ways that further explain the differences in gender effect in the two forums? A consideration of the types of cases combined with the profiles of arbitrators and judges is revealing.

First, consider the types of cases in litigation and arbitration. Before discrimination cases come before the court, they go through multiple vetting stages. First, employees have to decide whether to formally complain, then their lawyers assess the case merits and presumably advise against weak cases going forward, and then the EEOC reviews the case.⁸⁹ Thus, it is likely that many of the weakest employee cases fall out. Employers also have incentives to settle the strongest employee cases—particularly given the employers' concerns about negative publicity, the expense of litigation, and the unpredictability of judges' and juries' decisions. However, companies may not settle if they are trying to send a message to other employees that suits will be vigorously fought which, in turn, sends the signal that plaintiffs and their lawyers will have a long and expensive battle on their hands. This strategy is meant to discourage even strong cases from going to court. Thus, it is also possible that some of the strongest plaintiff cases do not end up in litigation either because of pre-trial settlement or plaintiffs dropping it due to expense. The resulting remaining cases from these employee and employer vetting processes are those in the middle moderate range, with fewer particularly weak or clearly strong cases on the merits.

A multi-stage vetting process also occurs with arbitration cases, although less is known about this process given the private nature of arbitration. It begins with employees deciding whether to formally complain through the employers' grievance process.⁹⁰ Arbitration is less public and expensive than litigation, but it is not without employee costs and consequences. An employee accusing her or his employer of sex discrimination, whether through litigation or arbitration, creates at best an awkward working situation and at worst serious employer retaliation. Employees' lawyers also review and

⁸⁹ See Pat K. Chew & Robert E. Kelley, *Unwrapping Racial Harassment Law*, 27 BERKELEY J. EMP. & LAB. L. 49, 61–63 (2006) (describing vetting process in racial harassment cases).

⁹⁰ As *Gilmer* establishes, employees waive their rights to court litigation if they are subject to mandatory arbitration provisions in their employment relationships. Thus, employees' choice is whether or not to pursue arbitration; they no longer have the choice between litigation and arbitration. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

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advise on the case's merits, presumably advising against pursuing unmeritorious claims. Thus, the likely result is that the weakest potential arbitration cases fall out, though it is possible that, if the employee does not consult an attorney, she or he may move forward with a weak case.

Employers are also likely to settle the strongest employee cases to avoid the hassle of arbitration. This tendency to settle, however, may be less prevalent than with litigation given that arbitration is less expensive, the process is private, and arbitrators may be considered more predictable and more inclined toward a management perspective. Given these circumstances, employers also would not be particularly incentivized to settle moderate cases.⁹¹ Thus, the employers' and employees' vetting process likely yields a range of arbitration cases, but particularly moderate to moderately strong cases with fewer particularly strong or particularly weak cases on the merits.

In summary, the cases in both arbitration and in litigation would cross the spectrum: many of the weakest cases would have fallen out in both forums (although perhaps less so in arbitration); the employer would have settled many of the strongest cases (although perhaps less so in arbitration); and the largest group of remaining cases would be the ones in the middle.

Now, consider the likely profiles of judges and arbitrators. Judges represent a more heterogeneous group than arbitrators. Nominations by both Republican and Democratic presidents, for instance, helps assure that federal judges will represent the political spectrum.⁹² Strikingly, federal court judges are about evenly split between those nominated by a Democratic president and a Republican president. Further, it is reasonable to assume that these judges will represent a spectrum of more pro-employee, more pro-management, or somewhere in the middle (moderate). In comparison, as discussed earlier, arbitrators as a group are likely to be more pro-management.⁹³

Thus, when both court cases and judges are considered, the result is court cases with a range of strengths being decided by judges with ranging degrees of pro-management, moderate, or pro-employee inclinations. Given these circumstances, it makes intuitive sense that the outcome of judicial proceedings taken as whole would be more varied and more difficult to predict. This effect is accentuated if only a subgroup of cases and judges is considered: moderately strong cases being judged by moderate judges where

⁹¹ Employers also would not be inclined to settle weak cases, but this group may be relatively small given the employees' and their lawyers' review processes described above.

⁹² A Republican President nominated 48.8% of all sitting judges and a Democratic President nominated 51.2%. *History of the Federal Judiciary*, FED. JUDICIAL CTR., http://www.fjc.gov/history/home.nsf/page/research_categories.html (last visited Mar. 17, 2016).

⁹³ See *supra* Part V.A.

variance is greatest. For this subgroup, one would expect judicial decisionmaking to be challenging, with relevant personal experience including gender, playing a larger role. Further, the supposition is that the larger the role for personal experiences in decisionmaking, the larger the gender effect.

With arbitrations, there also is a range of cases from weak to strong, with many in the middle. Arbitrators, however, are not as heterogeneous as judges and that lack of variation is likely to make a difference in the outcomes. The range of cases, particularly the moderate ones, offers the potential for the arbitrators' insights based on their personal experiences. Yet apparently, this does not occur. Arbitrators' comparatively homogenous profile, namely tending to be pro-management, appears to blunt the role of their personal experience or at least those experiences related to their gender. Hence, the gender effect among arbitrators is absent.

VI. CONCLUSION

This article considers why the arbitrators' gender does not make a difference in sex discrimination and sexual harassment case outcomes; that is, male arbitrators and female arbitrators do not have significantly different decisionmaking patterns. In stark contrast, the judges' gender does make a difference in these cases. Since the author posits that the gender effect in litigation affects the judges' decisionmaking process, what about the arbitral process explains the absence of the arbitrators' gender effect?

This inquiry led the author to considerations and then concerns about the arbitration process more broadly. While arbitration offers potential solutions to the costs and backlog of court litigation, those benefits need to be weighed against the possible downsides of arbitration. This article suggests that arbitration in practice has some built-in biases that may not serve justice. At the same time, arbitration is increasingly becoming mandatory in resolving employment disputes, thus replacing litigation and perhaps providing a fairer process in outcomes, oversight, and societal acceptance. Simply put, employers exercise their control as repeat players and tend to select more pro-management arbitrators. Complaining employees subsequently get the short end of the stick.

What can be done to address these concerns about the arbitration process? The research on the judges' gender and the arbitrators' gender suggests that more diversity in arbitrators' profiles would help offset the advantages of employer repeat players and create a fairer playing field. Perhaps thinking creatively about how to expand the arbitrators' pool (for instance, through nominations by judges, bar associations, law school deans, etc.) would yield arbitrators across a wider spectrum. Perhaps revising the arbitrators' selection

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process so that arbitrators are more randomly selected, or employers are limited in the number of times they can select the same arbitrator within a particular time frame, may diversify arbitrators and decrease the repeat-player advantages. Or perhaps, as with judges, finding ways to diminish the market and competitive pressures imposed on arbitrators would allow more focus on the arbitrators' basic qualifications, and thus ultimately minimize arbitrations' built-in biases and fairly serve both parties to the arbitration.

